

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

DONALD P. DESIR :  
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 v. : CA No. 03-084-T  
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 :  
 UNITED STATES OF AMERICA :

MEMORANDUM AND ORDER

Ernest C. Torres, Chief Judge.

Donald P. Desir has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. For the reasons stated below, that motion is denied.

Facts and Background

On January 15, 1998, a jury found Desir guilty of conspiring to possess, and attempting to possess, cocaine with intent to distribute it, in violation of 21 U.S.C. §841(a)(1) and §846.

On June 5, 1998, Desir was sentenced to 240 months of imprisonment. On May 24, 1999, the Court of Appeals, in an unpublished decision, affirmed his conviction. United States v. Desir, 181 F.3d 80 (1st Cir. 1999)(Table). Desir did not seek certiorari from the United States Supreme Court.

On July 12, 1999, Desir, acting *pro se*, filed a motion for a new trial pursuant to Fed.R.Crim.P. 33 (the "Rule 33

motion"), based, in part, on newly discovered evidence. The alleged newly discovered evidence was that the judicial officer presiding over Desir's jury empanelment was a magistrate judge and not a district judge.

On October 27, 2000, after an evidentiary hearing at which Desir was represented by counsel, this Court issued a written decision denying Desir's Rule 33 motion on the grounds (1) that, at the time of empanelment, Desir was aware that the empanelment was being conducted by a magistrate judge and that, by failing to object, he waived any right to empanelment before a district judge; and (2) that, in any event, Desir's trial counsel was aware that empanelment was being conducted by a magistrate judge and acted reasonably in choosing not to object. See United States v. Desir, 2000 WL 34019292 (D.R.I.).

On December 10, 2001 the First Circuit affirmed the denial of the Rule 33 motion. United States v. Desir, 273 F.3d 39 (1st Cir. 2001). With respect to the jury empanelment issue, the Court of Appeals cited this Court's finding that Desir was aware that empanelment was being conducted by a magistrate judge. It also stated that:

Even if appellant did not understand that the judge conducting the impanelment was a magistrate judge, defense counsel testified as to his personal knowledge of this. For purposes

of a Rule 33 motion based on newly discovered evidence, defense counsel's knowledge of the evidence and his or her understanding of its legal significance are imputed to the defendant. [Citation omitted.] Therefore, defense counsel's admitted knowledge that a magistrate judge was conducting voir dire is attributed to Desir, thereby nullifying any allegation that this was "newly discovered" evidence.

Desir, 273 F.3d at 44. Accordingly, the Court of Appeals found that Desir had failed to establish any "'newly discovered' evidence."

However, in a footnote, the Court of Appeals volunteered that "at most [Desir] has an ineffective assistance of counsel claim base on counsel's failure to inform defendant of the difference between a magistrate [judge] and an Article III judge." Desir, 273 F.3d at 44, n. 1. Desir apparently viewed that statement as an invitation which he accepted by filing this § 2255 motion on March 10, 2003.

Desir makes three claims:

- (1) that his trial counsel was ineffective in failing to inform him of the difference between a magistrate judge and an Article III judge, thereby depriving him of an opportunity to object to jury empanelment by a magistrate judge;
- (2) that counsel who represented him in this Court with respect to the Rule 33 motion was deficient because he sought relief under Rule 33 rather than pursuant to §2255; and
- (3) that counsel who represented him on appeal from the denial of the Rule 33 motion was deficient

because he failed to file a § 2255 motion instead.

### Standard of Review

The pertinent portion of § 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence is in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255, ¶ 1.

Generally, the grounds justifying relief under 28 U.S.C. §2255 are limited. A court may grant such relief only if it finds a lack of jurisdiction, constitutional error or a fundamental error of law. United States v. Addonizio, 442 U.S. 178, 184-185, 99 S.Ct.2235 (1979). "[A]n error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." Id. at 184-185 (internal quotations omitted).

### Analysis

In this case there is no need to decide whether an alleged failure to inform a defendant that his case is being empaneled by a magistrate judge rather than a district judge

risers to the level of a constitutional violation or a "complete miscarriage of justice" because Desir's petition is time barred.

I. Timeliness of Motion

There is a one-year statute of limitations for seeking relief under § 2255. The one-year period begins running upon the occurrence of the latest of five events specified in the statute. Only two of those events are relevant in this case. Thus, the pertinent portion of § 2255 provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

- (1) the date on which the judgment of conviction becomes final;  
... or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255, ¶ 6 (as amended by the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-132, 110 Stat.1214 (Apr. 24, 1996)).

Desir's petition is not timely under either of these provisions.

A. Finality of Conviction

The Supreme Court has held that "a judgment of conviction becomes final when the time expires for filing a petition for

certiorari contesting the appellate court's affirmation of the conviction." Clay v. United States, 537 U.S. 522, 525, 123 S.Ct. 1072 (2003). The time for filing a petition for certiorari expires 90 days after the entry of judgment by the court of appeals. See 28 U.S.C. § 2101(c), Supreme Court Rule 13.

In this case, the Court of Appeals entered judgment affirming Desir's conviction on May 24, 1999. Consequently, his conviction became final on August 22, 1999, approximately three and one-half years before his § 2255 motion was filed.

The fact that the Court of Appeals did not affirm the denial of Desir's motion for new trial until December 10, 2001 is immaterial for statute of limitations purposes. A motion for new trial based on newly discovered evidence which is filed more than ten days after conviction is not considered part of a direct appeal from the conviction; and, therefore, the conviction becomes "final" for purposes of §2255 when the direct appeal is decided. See Trenkler v. United States, 268 F.3d 16, 22 (1st Cir. 2001). See also Fed.R.App.P. 4(b)(providing that Rule 33 motions filed within ten days of conviction may be treated as part of a direct appeal). Here, Desir's motion for a new trial was not filed until July 12,

1999, more than a year after his conviction.

B. Discovery of Relevant Facts

Desir's §2255 petition also would be untimely even if the limitation period is measured from the date on which he first discovered the facts on which it is based. In July 1999, when Desir filed his Rule 33 motion, he already knew that jury empanelment had been conducted by a magistrate judge. Therefore, the one-year period during which he was required to file his §2255 petition would have expired no later than July 2000, more than two and one half years before the instant petition was filed.

II. Ineffective Assistance

Desir argues, in essence, that the delay in filing his §2255 petition should be excused because it is attributable to the ineffective assistance of counsel who represented him at the hearing on his Rule 33 motion and/or counsel who represented him on appeal from the denial of that motion. More specifically, he asserts that both counsel were deficient because they failed to file a § 2255 petition on his behalf. That argument lacks merit for several reasons.

First, counsel's alleged ineffectiveness would not excuse

Desir's tardiness in filing his § 2255 motion. As already noted, Desir knew the facts upon which his § 2255 motion is based before he retained counsel to represent him in connection with his Rule 33 motion. Therefore, he cannot claim that counsel's allegedly deficient performance prevented him from discovering those facts.

Second, the right that Desir claims to have been deprived of is his constitutional right to effective assistance of counsel in filing a § 2255 motion. However, it is well established that a defendant has no constitutional right to be represented by counsel in connection with a § 2255 motion. See Ellis v. United States, 313 F.3d 636, 652 (1st Cir. 2002), cert. den. 124 S.Ct. 99 (2003) ("A convicted criminal has no constitutional right to counsel with respect to [federal] habeas proceedings."), citing Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990 (1987); Green v. United States, 262 F.3d 715, 718 (8th Cir. 2001)(same). Accordingly, even assuming, arguendo, that competent counsel would have converted Desir's Rule 33 motion into a §2255 petition, Desir cannot base his ineffective assistance claim on the alleged deprivation of a non-existent right. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546 (1991), citing Wainwright v. Torna, 455 U.S. 586, 587-588, 102 S.Ct. 1300 (1982)(where there is no constitutional right to counsel there can be no



deprivation of effective assistance).

Third, even if Desir had a constitutional right to counsel, there is no merit to his claim that any of his counsel were ineffective. The Supreme Court has established a two-pronged test for determining whether counsel was ineffective. Strickland v. Washington, 466 U.S. 668, 687 (1984). It requires a defendant to demonstrate:

- (1) That his counsel's performance "fell below an objective standard of reasonableness"; and
- (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 688, 694; Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002). Here, Desir has failed to establish any of these things.

Desir has failed to establish that counsel acted unreasonably in not converting the Rule 33 motion that Desir, himself, filed into a § 2255 motion alleging that trial counsel was ineffective, because there was no basis for such an allegation. The alleged ineffectiveness of trial counsel consisted of what Desir claims was a failure by trial counsel to inform him that the jury was being empaneled by a magistrate judge. However, this Court found, after an evidentiary hearing, that Desir was aware of that fact. See Desir, 2000 WL 34019292 at \*5.

Moreover, this Court also found that, even if Desir was not aware that empanelment was being conducted by a magistrate judge, counsel's alleged failure to inform him of that fact or to object were not likely to have affected the outcome of the trial. In denying Desir's motion for a new trial, this Court noted that the magistrate judge was more liberal than this Court in permitting counsel to participate in the questioning of prospective jurors, and that Desir failed to identify anything that the magistrate judge did during empanelment that may have prejudiced him or altered the result. Id.

#### Conclusion

Because Desir's § 2255 motion was filed long after the one-year period of limitations set forth in the statute, and because Desir has failed to demonstrate that he was prevented from filing a timely motion by any ineffective assistance on the part of his counsel, Desir's § 2255 petition is denied and dismissed.

It is so ordered.

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Ernest C. Torres  
Chief Judge

Dated: